

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LINDA DENNIS,)	
)	
Plaintiff,)	CASE NO. C06-280-RSM-MJB
)	
)	REPORT AND
)	RECOMMENDATION
LINDA S. McMAHON, ¹)	
Acting Commissioner of Social Security,)	
)	
Defendant.)	
_____)	

Plaintiff Linda Dennis appeals to the District Court from a final decision of the Commissioner of the Social Security Administration (the “Commissioner”) denying her application for Supplemental Security Income under Title XVI of the Social Security Act. For the reasons set forth below, it is recommended that the Commissioner’s decision be REVERSED and REMANDED for further proceedings.

I. PROCEDURAL HISTORY

Plaintiff applied for Supplemental Security Income (“SSI”) on May 3, 2002, alleging disability since January 15, 2001, and identifying her impairments as learning disabilities, anxiety, memory problems, diabetes, hypertension, and injuries in her neck

¹ Defendant substituted pursuant to F.R.C.P. 25(d)(1) and 42 U.S.C. § 405(g). Linda S. McMahon became Acting Commissioner of Social Security on January 20, 2007.

1 and shoulder. (Tr. 78). The Social Security Administration denied Plaintiff's
2 application initially (Tr. 26-29) and upon reconsideration (Tr. 35-37). A hearing was
3 held before Administrative Law Judge ("ALJ"), Richard Peyser, on November 3, 2004.
4 Plaintiff, who was represented by counsel, testified at the hearing. (Tr. 316-77).
5 Norman Gustavson, Ph.D., testified as a psychologist medical expert, (Tr. 48-53, 352-
6 62, 364-65, 367-68) and a vocational expert ("VE"), William Weiss, also testified at the
7 hearing (Tr. 56-60, 368-76). The ALJ issued an unfavorable decision on December 22,
8 2004, finding that Plaintiff is able to perform a significant number of jobs in the state
9 and national economies despite her limitations, and thus, she was not under a disability
10 at any time through the date of the decision. (Tr. 10-12, 23). On January 20, 2006, the
11 Appeals Council denied Plaintiff's request for review, making the ALJ's decision the
12 final decision of the Commissioner. (Tr. 5-7). Plaintiff timely filed her appeal with this
13 Court.

14 II. THE PARTIES' POSITIONS

15 Plaintiff requests that the Court reverse the Commissioner's decision and remand
16 for further administrative proceedings. Plaintiff argues that the ALJ erred by: 1) failing
17 to properly evaluate the opinions of non-examining state-agency psychologists Dr.
18 Eisenhower and Dr. Comrie, whose opinions were more restrictive than the ALJ's
19 hypothetical question given to the VE; 2) relying on the VE's testimony when the ALJ
20 had not provided a hypothetical that accurately reflected the Plaintiff's educational level;
21 and 3) relying on the VE's testimony about reaching, which departed from the
22 Dictionary of Occupational Titles ("DOT") without a reasonable explanation.

23 Defendant responds that the Commissioner's decision should be affirmed because the
24 ALJ applied correct legal standards and supported his decision with substantial evidence.

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III. STANDARD OF REVIEW

The court may set aside the Commissioner's denial of social security disability benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence is defined as more than a mere scintilla but less than a preponderance; it is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and for resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). Where the evidence is susceptible to more than one rational interpretation, it is the Commissioner's conclusion which must be upheld. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir. 1982).

IV. EVALUATING DISABILITY

The claimant bears the burden of proving that he is disabled. *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). Disability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment, which can be expected to result in death, or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. § 423(d)(1)(A).

The Social Security regulations set out a five-step sequential evaluation process for determining whether claimant is disabled within the meaning of the Social Security Act. *See* 20 C.F.R. § 416.920. At step one, the claimant must establish that he or she is not engaging in any substantial gainful activity. 20 C.F.R. §§ 404.1520(b), 416.920(b). At step two, the claimant must establish that he or she has one or more medically severe

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1 impairments or combination of impairments. If the claimant does not have a “severe”
2 impairment, he or she is not disabled. *Id.* at § (c). At step three, the Commissioner will
3 determine whether the claimant’s impairment meets or equals any of the listed
4 impairments described in the regulations. A claimant who meets one of the listings is
5 disabled. *See id.* at § (d).

6 At step four, if the claimant’s impairment neither meets nor equals one of the
7 impairments listed in the regulations, the Commissioner evaluates the claimant’s residual
8 functional capacity and the physical and mental demands of the claimant’s past relevant
9 work. *Id.* at § (e). If the claimant is not able to perform his or her past relevant work,
10 the burden shifts to the Commissioner at step five to show that the claimant can perform
11 some other work that exists in significant numbers in the national economy, taking into
12 consideration the claimant’s residual functional capacity, age, education, and work
13 experience. *Id.* at § (f); *Tackett v. Apfel*, 180 F.3d 1094, 1100 (9th Cir. 1999). If the
14 Commissioner finds the claimant is unable to perform other work, then the claimant is
15 found disabled.

16 V. SUMMARY OF THE RECORD EVIDENCE

17 Plaintiff, who was born in December, 1955, was 48 years old at the time of the
18 hearing before the ALJ. (Tr. 369). She has previously worked as a hostess, cook,
19 housekeeper, and childcare provider. (Tr. 79, 92-96, 327). The Plaintiff has completed
20 the eleventh grade. (Tr. 14, 330). In her disability report, Plaintiff indicated that her
21 condition limits her ability to work because she has a learning disability, memory
22 problems, diabetes, hypertension, anxiety, and suffers from injuries to her neck and
23 shoulder. (Tr. 78). In addition, Plaintiff alleges that she was involved in a Metro bus
24 accident on January 15, 2001, in which she injured her neck, back, and shoulder. (Tr.

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1 14, 78). Other evidence relevant to Plaintiff's claims is incorporated into the discussion
2 below.

3 VI. THE ALJ'S DECISION

4 The ALJ found that Plaintiff has not engaged in substantial gainful activity since
5 the alleged onset of her disability. (Tr. 14, 22). He determined that Plaintiff has the
6 following impairments that, when combined, are severe: a generalized anxiety disorder
7 with symptoms of posttraumatic stress disorder, low average to borderline intelligence, a
8 mild to moderate depressive disorder, hepatitis C, diabetes mellitus, pain across the top
9 of her feet, and a history of cervical strain and a right shoulder contusion resulting from
10 a bus accident. (Tr. 19, 22). However, the ALJ found that these impairments do not
11 meet or equal one of the listed impairments in Appendix 1, Subpart P of the Regulations.
12 (Tr. 19, 21).

13 The ALJ determined that Plaintiff's residual functional capacity ("RFC") is a
14 limited ability of light work. (Tr. 19, 22). Specifically, he found that Plaintiff's RFC
15 includes no repetitive reaching out to the front or the side with her right arm, and she
16 cannot perform work in hazardous conditions such as working around dangerous
17 machinery, open water, or heights. (Tr. 19, 22). He found that Plaintiff is able to sit,
18 stand, and walk for 6 hours in an 8 hour day, and she retains the ability to lift and carry
19 up to 10 pounds frequently and 20 pounds occasionally. (Tr. 19, 22). The ALJ also
20 found that, due to mental impairments, the Plaintiff is limited to short superficial
21 contacts with the public on a short interactive exchange basis, but she retains the ability
22 to perform simple and moderately complex work tasks. (Tr. 19, 22). Thus, the ALJ
23 found that the Plaintiff is unable to perform her past relevant work. (Tr.19, 22). In
24 reaching this conclusion, the ALJ found that Plaintiff's allegations regarding her
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1 limitations were not credible and were not supported by objective medical evidence.
2 (Tr. 19-20, 22).

3 At step five, the ALJ determined that based on the Plaintiff's age, education, past
4 work experience, RFC, and the VE's testimony, the Plaintiff retains the capacity to
5 adjust to work that exists in significant numbers in the national economy, including
6 cashier II, semiconductor bonder, call operator, and charge account clerk. (Tr. 21, 23).
7 Therefore, the ALJ concluded that Plaintiff was not disabled at any time through the date
8 of the decision and is not eligible for SSI payments. (Tr. 21, 23).

9 VII. DISCUSSION

10 A. Opinions of Non-Examining State Agency Experts

11 Plaintiff argues that the ALJ erred in step five because he failed to evaluate the
12 opinions of non-examining state agency psychologists, Dr. Eisenhower and Dr. Comrie,
13 which were more restrictive than the ALJ's mental residual functional capacity finding
14 and more restrictive than the hypothetical question that the ALJ posed to the VE. The
15 Commissioner asserts to the contrary that the ALJ's conclusion that the Plaintiff could
16 perform various unskilled jobs was consistent with the opinions of Dr. Gustavson, Dr.
17 Eisenhower, and Dr. Comrie.

18 Social Security Ruling 96-6p provides that an ALJ cannot ignore the opinions of
19 state agency physicians and must explain the weight to be given to a state agency
20 physician's opinion in their decisions. However, the ALJ is not bound by any findings
21 made by state agency medical or psychological consultants, or other program physicians
22 or psychologists. 20 C.F.R. § 404.1527(f)(2)(i).

23 In this case, the ALJ cited to the opinions of two non-examining psychologists,
24 Dr. Eisenhower and Dr. Comrie, when he determined that the Plaintiff was not disabled.

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1 (Tr. 16). The ALJ concluded that due to her mental impairments, the Plaintiff should
2 only have short superficial exchanges, but the Plaintiff retains the ability to perform
3 moderately complex work tasks. (Tr. 22).

4 The Commissioner contends that the Plaintiff erroneously cited Dr. Eisenhauer's
5 opinion. As such, the Commissioner contends that citations to opinions provided in
6 Section I of the Mental RFC Assessment are erroneous because ALJs are supposed to
7 base their findings only on Section III of the Assessment. Upon review of the record,
8 however, there appears to be little difference between Dr. Eisenhauer's opinion in
9 Sections I and III. (*See* Tr. 211-13). For example, in Section I, Dr. Eisenhauer notes
10 that the Plaintiff has a marked limitation in her ability to understand and remember and
11 carry out detailed instructions. (Tr. 211). Similarly, in Section III, Dr. Eisenhauer states
12 that the Plaintiff's "decreased intellect limits her from doing detailed tasks. She remains
13 able to do simple and repetitive tasks. Ongoing anxiety symptoms limit sustained
14 concentration for detailed tasks." (Tr. 213). The distinction the Commissioner draws is
15 not supported by the record and, therefore without merit.

16 A careful review of the record reveals that the ALJ did not adequately summarize
17 the expert opinions of Dr. Eisenhauer and Dr. Comrie. In addition, the ALJ did not
18 explain what weight he gave to the opinions of Dr. Comrie and Dr. Eisenhower. *See*
19 SSR 96-6p. Moreover, the ALJ did not acknowledge Dr. Eisenhauer's Mental Residual
20 Functional Capacity Assessment ("Mental RFC Assessment"), which stated that the
21 Plaintiff's "decreased intellect limits her from doing detailed tasks." (Tr. 213). Further,
22 Dr. Eisenhauer's opinion is contradicted by Dr. Gustavson's opinion. Dr. Gustavson
23 testified at Plaintiff's hearing at the ALJ's request, and he determined that the Plaintiff
24 was capable of performing "simple, repetitive, as well as moderately complex work
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1 tasks.” (Tr. 18). The ALJ failed to reconcile these conflicting opinions.

2 An ALJ is responsible for determining credibility and resolving ambiguities and
3 conflicts in the medical evidence, but the ALJ in this case did not reconcile the
4 conflicting opinions of the non-testifying, non-examining experts, who concluded that
5 the Plaintiff had limitations in her ability to carry out detailed instructions. Accordingly,
6 I conclude that the ALJ erred in not properly evaluating the testimony of two non-
7 examining experts at step five. *See* SSR 96-6p; *Lester v. Chater*, 81 F.3d 821, 830-32
8 (9th Cir. 1995).

9 **B. Plaintiff’s Remaining Claims**

10 The Plaintiff’s remaining alleged errors relate to whether the ALJ improperly
11 relied on the VE’s testimony. Having found error at step five, the court need not reach
12 the remaining issues raised. These remaining issues are best addressed on remand.

13 **VIII. CONCLUSION**

14 The Commissioner’s determination to deny Plaintiff SSI benefits contains legal
15 errors and is not supported by substantial evidence. Based on the record evidence, the
16 undersigned recommends that the Commissioner’s decision be reversed and remanded.
17 A proposed Order accompanies this Report and Recommendation.

18 DATED this 1st day of February, 2007.

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21 MONICA J. BENTON
22 United States Magistrate Judge
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